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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1982

No. 81 6598

WAYNE LADD KRIER, Petitioner,

vs.

STATE OF GEORGIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE GEORGIA SUPREME COURT

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April 23, 1982

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TO THE GEORGIA SUPREME COURT

Petitioner, Wayne Ladd Krier, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Georgia Supreme Court entered in this proceeding on February 23, 1982.

OPINION BELOW

The opinion of the Georgia Supreme Court, Case No. 37809, reported at 249 Ga. 80, --S.E.2d--(1982), appears in Appendix A hereto.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on February 23, 1982, affirming Petitioner's conviction on the charge of murder and imposition of the sentence of death. Petitioner's conviction and sentence having thereby become final, as has the Opinion and Order of the Georgia Supreme Court, the jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment XIV: "...nor shall any state deprive any person of life, liberty, or property, without due process of law,..."

Amendment V: "No person...shall be compelled in any criminal case to be a witness against himself..."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Petitioner was indicted by the September, 1979, Grand Jury of DeKalb County, Georgia, on the charge of murder.

Pretrial Motions were heard the week of February 11, 1980, before the Honorable R. Keegan Federal, Jr..

Trial of the case commenced on February 19, 1980, before the Honorable R. Keegan Federal, Jr., and a jury. On February 21, 1980, the jury returned a verdict of guilty to the charge of murder.

On February 22, 1980, after further evidence and deliberation, the jury returned a recommendation that the Petitioner be sentenced to death.

The date of execution was set for April 26, 1980.

Motion for New Trial was filed on March 20, 1980, and amended April 1, 1981.

Motion for New Trial was denied on May 12, 1981.

Notice of Appeal to the Georgia Supreme Court was filed on June 9, 1981.

The opinion and judgment of the Georgia Supreme Court affirming Petitioner's conviction and sentence of death was entered on February 23, 1982.

STATEMENT OF THE FACTS

In August, 1979, Petitioner, Wayne Ladd Krier, escaped from a penal institution in North Carolina where he had been serving a term for armed robbery. At the time of his escape, Krier had been in prison for approximately ten years and had been promoted to the position of Trustee. He made his way to Atlanta, and using the name of Nick Michael Cordoba, obtained a job at Guthrie's Carnivals. (T. 1127).

The victim, Teresa Lavin, a 22-year-old part-time student at Georgia State University, lived in the Chesterfield Apartments along with Ms. Bartlett Carpenter, Ms. Carpenter's son, Brad, and Mr. Mark Butcher.

Several days prior to her death, Ms. Lavin was babysitting for Brad Carpenter while Ms. Carpenter and Mr. Butcher were out of town. She took Brad and a friend of Brad's to the carnival. While at the carnival, Ms. Lavin came up to Mr. Krier where he was selling tickets for a ride. She asked him if he had any marijuana. He replied that he did not, but that he might be able to locate some at a later time. She then wrote her name and telephone number on a ticket and gave it to him. Mr. Krier called Ms. Lavin later that night to tell her that he had found some marijuana. She told him that there was a party going on at her apartment and that he should come over. Mr. Krier declined the invitation, so Ms. Lavin said that he should come over at 11 o'clock the next morning. When he arrived the next morning, she answered the door in a nightgown, and told him that she forgot he was coming over and to telephone her later because somebody else was there. Mr. Krier left to go back to work.

Several days later, Mr. Krier again called Ms. Lavin and she told him to come on over, that she was cleaning her apartment. Mr. Krier and another individual, Mr. Daniel Cody, went over to Ms. Lavin's apartment complex in a car which Krier had borrowed from a girlfriend. They checked in with the security guard, who took Mr. Krier's name and the license tag number off of the automobile. Mr. Krier and Mr. Cody were unable to find

Ms. Lavin's apartment, so they left, signing out with the security guard as they exited. Mr. Krier then went and got something to eat, after which he took two Quaalude tablets and two hits of LSD. He called Ms. Lavin on the telephone again and she told him that he had gone to the wrong apartment and that he should come over right then. Mr. Krier went back alone to Ms. Lavin's apartment. This time the security guard allowed him to go through the security gate, but did not sign him in or out. (T. 1012-1016).

When Mr. Krier got to Ms. Lavin's apartment, she was vacuuming. She let him in, and they smoked some marijuana. He then helped her clean her apartment for a while, and then they smoked some more marijuana. While they were smoking, Mr. Krier reached over and touched Ms. Lavin on her shoulder in order to get her attention. When he did this, she turned around and glared at him, and then began hitting him and screaming obscenities at him for no apparent reason. Mr. Krier then slapped her so hard that it spun her around and in response, she swung the vacuum cleaner tube at him. Mr. Krier then took out a knife, and in a drug-induced rage, slashed Ms. Lavin to death. He also hit Ms. Lavin with the telephone receiver hard enough to break the receiver. Mr. Krier then fled the apartment and drove back to the carnival, where he left his blood-stained pants and the knife in a carnival truck. He then drove to Birmingham where he sold the car for $95.00 and bought a bus ticket to New Orleans, where he staved for two days before being arrested. (T. 166, 182, 188, 1244).

A warrant for the arrest of the accused was obtained several days pryor to his arrest. (T. 56-57). Immediately after his arrest, Mr. Krier was advised, by the New Orleans police, of his Constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966). It is unquestioned that immediately upon his arrest in New Orleans, Mr. Krier refused to waive the rights accorded him under Miranda v. Arizona, supra. This fact is made certain by Defense Exhibit No. 1 (T. 1603) and Defense Exhibit No. 2 (T. 1604). D-1 is a copy of the New Orleans Police Arrest Register; D-2 is a copy of the New Orleans Police General Case Report concerning Mr. Krier's

arrest. Both D-1 and D-2* contain explicit statements that Appellant was informed of his Miranda rights and that he refused to waive these rights.

During the pre-trial hearings, Mr. Krier testified that at the time of his arrest he specifically requested to talk to an attorney but that he never talked to one (T. 211, 215) except when he talked very briefly to a public defender about extradition. At this hearing, Mr. Krier was among about 20 prisoners with whom a single public defender briefly conversed. When this public defender learned that Mr. Krier intended to waive extradition, he ended the brief conversation and told Mr. Krier that he had nothing to do with the Georgia case. (T. 220). This conversation took place in open court shortly before Mr. Krier waived extradition back to Georgia. (T. 220). However, before Mr. Krier ever spoke with the public defender, the DeKalb County police approached Mr. Krier in jail in New Orleans and obtained a written waiver of his Miranda rights. (T. 200).

Also at the New Orleans extradition hearing, the DeKalb police were instructed by the Judge not to question Mr. Krier about the crime while on the way back to Atlanta. The DeKalb County investigator testified at trial that he knew he was not supposed to talk to Mr. Krier, "Because of the Miranda rights in here. He had the right to an attorney." (T. 203, 204). Upon his arrival in DeKalb County, however, Mr. Krier was interrogated by the DeKalb County police and gave a series of statements and confessions to the investigators, during which he admitted killing Ms. Lavin.

At trial, Mr. Krier's statements to the DeKalb County police were admitted into evidence, over his objection. Mr. Krier requested the Trial Judge to instruct the jury on the lesser included offense of voluntary manslaughter, but this request was refused by the Trial Judge. Mr. Krier was convicted of murder and sentenced to death. The Supreme Court of Georgia affirmed the conviction and the sentence of death.

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*D-1 and D-2 are attached hereto as Appendix B and C.

QUESTIONS PRESENTED

1. Whether, in a capital murder case, when the accused's life is at stake, where there is some, slight evidence negating malice and pointing to provocation of the accused by the deceased, the Trial Court can, consistent with due process, determine that the quantum of evidence presented by the accused was insufficient as a matter of law to warrant an instruction to the jury on the lesser-included offense of voluntary manslaughter?

2. Whether the Fifth, Sixth, and Fourteenth Amendments prohibit the police from further interrogating an accused who has unequivocally refused to waive his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966), unless the accused himself initiates further communication with the police?

3. Whether a sentence of death may be constitutionally imposed where the sentencing jury was permitted to consider evidence of the accused's prior convictions and sentence for armed robbery without any limiting instructions on its use and where the sole state statutory grounds for seeking the death penalty was that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"? Ga. Code Ann. §27-2534.1(b)(7)

REASONS FOR GRANTING THE WRIT

1. The Trial Court's failure to charge on the lesser included offense.

At the close of the guilt/innocence phase of his trial, the Petitioner, Wayne Krier, requested the Court to instruct the jury as to the lesser included offense of voluntary manslaughter, arguing that there was evidence that he had denied bearing any malice towards the victim, and that the fatal slashing was the result of provocation by the victim. (T. 1286). The evidence at the trial was clear in that Mr. Krier denied bearing any malice toward the victim and denied that he had gone to her apartment with any scheme or even any thought of harming her, much less killing her. (T. 1138-1197, 1230-1239). The evidence

as to provocation and an impassioned killing, however, was weaker. The entire evidence as to the issue of voluntary manslaughter was offered exclusively by Mr. Krier. Petitioner's pre-trial statements to the police repeatedly make the point that he reached over and touched Ms. Lavin on her shoulder and that she turned and glared at him with a look of contempt or disgust and then started hitting Mr. Krier for no apparent reason. (T. 166, 182, 188). Petitioner's pre-trial statements make the point that he then slapped Ms. Lavin with his open hand, hard enough to spin her around, but that she continued to rush at him and to hit him with her fists. (T. 166, 182, 1888). It was only after this altercation between Mr. Krier and Ms. Lavin that Mr. Krier pulled out the knife and slashed Ms. Lavin. During the sentencing phase of the trial, Mr. Krier told a slightly contradictory story, stating that it wasn't until after he slapped her with his open hand that she began to hit him with her fists and with the vacuum cleaner tube. (T. 1244).

The Georgia Supreme Court found that there was not sufficient provocation to warrant a charge on voluntary manslaughter. The Supreme Court did not say that there had been no provocation, only that there had been no serious provocation. This raises the question, whether the death penalty may be constitutionally imposed when the Trial Court has withdrawn from the jury's consideration the issue of a lesser included offense on the grounds that the quantum of evidence on the issue of provocation is insufficient, as a matter of law, to invoke the statute on involuntary manslaughter.

There is no question that manslaughter is a lesser included offense of the crime of murder. Stevenson v. United States, 162 U.S. 313 (1896). Therefore, the only consideration is of the evidentiary predicate necessary to support a request for a lesser included offense instruction. Ordinarily, a lesser-included offense instruction is only proper where there is "a disputed factual element", i.e., where "there are disputed issues of fact which would enable the jury rationally to find" that all elements of the lesser offenses have been proved. Sansone v. United States, 380 U.S. 343 (1965).

The Federal Circuit Courts of Appeals have interpreted Sansone to mean that "when the government has made out a compelling case, uncontroverted on the evidence, on an element required for the charged offense but not for the lesser included offense, there is a duty on the defendant to come forward with some evidence on that issue if he wishes to have the benefit of a lesser included offense charge." Driscoll v. U.S., 356 F.2d 324, 327 (1st Cir. 1966). In order to refuse a lesser included offense instruction, two prerequisites seem to be vital: "That there be no factual dispute and that a finding contrary to the only evidence in the issue would be irrational." Driscoll v. U.S., supra at 327. See also, United States v. Crutchfield, 547 F.2d 496 (9th Cir. 1977); United States v. Madden, 525 F.2d 972 (5th Cir. 1976); United States v. Thompson, 490 F.2d 1218 (8th Cir. 1974); United States v. Harary, 457 F.2d 471 (2nd Cir. 1972); Government of Virgin Islands v. Carmona, 422 F.2d 95 (3rd Cir. 1970); United States v. Comer, 421 F.2d 1149 (D.C. Cir. 1970); Belton v. United States, 382 F.2d 150 (D.C. Cir. 1967); Larson v. United States, 296 F.2d 80 (10th Cir. 1961).

Most of the Federal Circuit Courts of Appeals have stated that they would allow an instruction on a lesser included offense only when there is enough evidence to provide a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser included offense. However, some courts have said that any evidence, however weak, is enough to justify an instruction on the lesser included offense and that in a close case the Trial Court should generally give an instruction if requested. United States v. Comer, 421 F.2d 1149, 1154 (D.C. Cir. 1970); see also, United States ex rel. Matthews v. Johnson, 503 F.2d 339 (3rd Cir. b974).

The quantum of evidence that state courts describe as necessary to justify a lesser included offense instruction varies from state to state. In Louisiana and Florida, the Trial Court must instruct on lesser included offenses even if there is no evidence tending to show the defendant guilty only of the lesser offsnse. See, State v. Madison, 319 So.2d 912 (La. 1975);

Brown v. State, 206 So.2d 377 (Fla. 1968). In Pennsylvania, in a murder trial, a defendant is entitled, upon request, to an instruction on a lesser included offense. United States ex rel. Matthews v. Johnson, 503 F.2d 339. 346 (3rd. 1974). California requires, upon request, an instruction on a lesser included offense, because the jury may wish to soften the "harsh application of the law". People v. Powell, 208 P.2d 974, 981 (1949). The majority of jurisdictions, however, allow lesser included offense instructions only when the evidence sustains a rational belief in the defendant's guilt of a lesser crime. See, Beck v. Alabama, 447 U.S. 625, 636 (1980), n. 12.

Georgia appears to follow the majority of states. In Georgia, in order to warrant a charge in voluntary manslaughter, the evidence must not only show an act of violent passion, but also some serious provocation sufficient to excite such passion in a reasonable person. Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980). If there is any evidence, however slight, as to whether an offense is murder or voluntary manslaughter, instructions as to the law of both offenses should be given to the jury. Swett v. State, 242 Ga. 228, 248 S.E. 2d 629 (1978). However, in Georgia, it is a question of law for the courts to determine whether there is slight evidence that the defendant acted as a result of sudden, violent and irresistible passion resulting from serious provocation. Swett, supra. In the case now before the Court, the Georgia Supreme Court decided as a matter of law that there had been "no serious provocation" sufficient to justify a charge on voluntary manslaughter.

In a case where the accused's life is at stake, it is constitutionally impremissible to allow the Trial Court to determine as a matter of law that the evidence negating the element of malice (i.e., the evidence bearing on the degree of provocation) is insufficient to require a charge on voluntary manslaughter. Proof of homicide necessarily involves proof of malice. Malice in connection with the crime of murder means the condition of a man's heart or mind at the time of the killing. Because no one can look into the heart or mind of another with any certainty, the only way to decide the issue is to infer it

from all of the facts or circumstances surrounding the killing. That inference is one of fact for a jury. Stevenson v. United States, 162 U.S. 313, 320 (1895). By refusing to charge on a lesser included offense of voluntary manslaughter, the trial court denied petitioner his right to have every issue fairly decided by a jury, beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). The trial court may have believed that Mr. Krier's evidence was wholly incredible and inadequate as a matter of law and that it was clear that he was actuated by malice at the time of the killing. But as the United States Supreme Court held in Stevenson v. United States, 162 U.S. 313 (1895), "...if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all of the evidence what the condition of the mind was, and to say whether the crime was murder or manslaughter." Supra at 323.

It was assumed by this Court, when it upheld the constitutionality of the Georgia death penalty statute in Gregg v. Georgia, 428 U.S. 153 (1976) that the Trial Judge was required to charge lesser included offenses when they were "supported by any view of the evidence." Gregg, supra at 163. The Gregg opinion cites two Georgia cases in support of this proposition: Sims v. State, 203 Ga. 668, 47 S.E.2d 862 (1948) and Linder v. State, 132 Ga. App. 624, 625, 208 S.E.2d 630, 631 (1974). Both Sims and Linder argue that it is for the jury to decide whether an offense is murder or manslaughter, Sims at 864, Linder at 631, even where the amount of provocation is not shown. Linder at 631. In part, this is because the jury can choose to believe or disbelieve any part of the accused's testimony, confessions or statements. Sims at 865. Clearly, in the constitutional scheme envisioned by this Court in Gregg, in a capital case, where the accused's life is at stake, due process requires that the accused be accorded the procedural safeguard of an instruction on a lesser included offense where there is any evidence, however weak or contradictory, on the lesser offense. This is particularly true where the evidence clearly establishes that the accused is guilty of a serious, violent offense but because of the accused's own testimony

leaves some doubt with respect to the issue of malice (an element that if not proved beyond a reasonable doubt would not justify conviction of a capital offense). Then, the failure to give the jury the option of convicting on a lesser included offense of voluntary manslaughter enhances the risk of conviction of the capital offense of murder. See, Beck v. Alabama, 447 U.S. 625 (1979); Keeble v. United States, 412 U.S. 205 (1972).

"Such a risk cannot be tolerated in a case where the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments...." Beck v. Alabama, 447 U.S. 625, 637 (1979); see, Gardener v. Florida, 430 U.S. 349 (1977). As this Court said in Beck v. Alabama, "...if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction," the State is constitutionally prohibited from withdrawing that option from the jury in a capital case. Beck, at 638.

Beck was scrutinizing a unique Alabama statute that prohibited the trial court from instructing the jury in a capital case as to a non-capital, lesser included offense. The Court held that that section of the statute was unconstitutional and violative of due process. While Georgia has no comparable statutory prohibition, the reasoning of Beck applies to this case. Where a defendant is on trial for his life on a charge of murder and there is some slight evidence tending to leave some doubt with respect to the element of malice, it violates due process under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution for the Trial Court fo fail to instruct the jury on a lesser included offense of voluntary manslaughter.

The danger in refusing the charge on voluntary manslaughter becomes obvious when one reads the Court's instructions to the jury on the issue of malice. The Trial Court instructed the jury during a homicide, "Malice shall then be implied, unless there is evidence showing considerable provocation for the commission of the act." (T. 1309-1310). But the Trial Court did not instruct the jury that if they found such provocation to exist that they

could then consider the offense of voluntary manslaughter. The jury was left with no option other than to acquit or convict, where it was obvious that Mr. Krier had caused the death of Ms. Lavin. This is precisely the situation condemned by the Supreme Court in Beck and Keeble.

This cause should be taken for review so that this Court can determine whether, in a capital case, where the accused's life is at stake, the trial court can constitutionally determine, consistent with the constitutional mandates of due process, that the quantum of evidence presented by the accused was insufficient as a matter of law to warrant a jury instruction on the lesser included offense of voluntary manslaughter.

2. The confession obtained after Petitioner refused to waive his rights under Miranda v. Arizona.

When Mr. Krier was arrested in New Orleans, he was advised of his Miranda rights and the police reports of the New Orleans Police Department clearly state that he refused to waive his Miranda rights (T. 1603, 1604). Mr. Krier testified during pretrial hearings that shortly after his arrest he specifically requested to talk to an attorney before answering questions (T. 211, 215). The New Orleans authorities did not continue questioning Mr. Krier. The day after Mr. Krier's arrest, Investigator Rowell of the DeKalb County, Georgia, Police Department reinformed Mr. Krier of his Miranda rights and secured a written waiver of these rights. (T. 135). The next morning Mr. Krier was taken before a judge for an extradition hearing. At this hearing, Mr. Krier was among about 20 prisoners with whom a single public defender briefly conversed. When this public defender learned that Krier intended to waive extradition, he ended the brief conversation and told Krier that he had nothing to do with the Georgia case. (T. 220). The Judge instructed Detective Rowell that he was not to question the defendant during the trip back to Georgia, and Detective Rowell testified at trial that he understood the Judge to mean that he could not talk with the defendant because of the defendant's Miranda rights and

specifically the fact that the defendant had the right to an attorney. (T. 203, 204). Upon their return to DeKalb County, Georgia, Detective Rowell readvised the Defendant of his Miranda rights and began a lengthy interrogation during which the defendant repeatedly incriminated himself. Nowhere in the record is it alleged that Mr. Krier ever initiated any communication, exchange or conversation with the police.

The decision of the Georgia Supreme Court applied to the above facts in this case conflicts with the decisions of this Court in Edwards v. Arizona, 451 U.S. 477 (1981) and Miranda v. Arizona, 384 U.S. 436 (1966). In Edwards v. Arizona, supra, this Court held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. This Court further held in Edwards that once an accused has expressed his desire for counsel, he is not subject to further interrogation by the police until counsel has been made available to him, unless the accused himself initiates further communication with the police. Edwards v. Arizona, supra at 1885-86.

The Georgia Supreme Court held that the ruling in Edwards, supra, did not apply in the instant case. They distinguished Edwards on three grounds. First, Georgia Supreme Court pointed out that "it is not undisputed that Appellant made a request for counsel while in custody of New Orleans authorities." (Appendix A, p. 2). Second, the Georgia Court went on to say that even assuming assertion of the Defendant's rights, further inquiry by the Georgia authorities was not prevented, where the Georgia authorities reasonably understood that no request for counsel had been made. Third, the Georgia Supreme Court held that there was no doubt that the defendant's confessions were obtained only after the "intentional relinquishment or abandonment of a known right or privilege."

Assuming for the purpose of argument that the Georgia Supreme Court is correct in stating that Mr. Krier did not properly assert his right to counsel, it is still unchallenged that Mr. Krier unequivocally refused to waive his Miranda rights immediately upon his arrest. (T. 1603, 1604, see Appendix B and C). Two important questions are raised by Mr. Krier's refusal to waive his Miranda rights:

(1) Whether a refusal to waive one's rights under Miranda is equivalent to an assertion of those rights?

(2) Whether the rule of Edwards should apply to a situation where one generally exercises his rights under Miranda (i.e., the right to remain silent) rather than makes a specific request for counsel?

The answer to both of these questions must be in the affirmative.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), makes it clear that if the individual indicates "in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Miranda, supra, at 473-474. (Emphasis Added). The "in any manner" language used by the Court in Miranda makes it clear that the refusal to relinquish one's Miranda rights is equivalent to an invocation of one's Fifth Amendment privilege.

In the case before this Court, the only conclusion is that Mr. Krier's refusal to waive his Miranda rights is an affirmative assertion of those rights and that any statement taken subsequently by the police is the product of coercion and therefore inadmissable at the trial of the case. This conclusion should be dispositive of the case except that the Georgia Supreme Court argued that Mr. Krier's behavior subsequent to his arrest amounts to a voluntary and knowing waiver of his Miranda rights.

However, as the Court in Edwards, supra, wrote, absent further interrogation "there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver." Edwards, supra at 1885. The rule announced in Edwards avoids the arduous decisions that must be made in determining whether or not a valid waiver has occurred. This brings us to the second question.

The rule in Edwards was limited to cases where the individual had clearly asserted his right to counsel under the Fifth Amendment and Miranda v. Arizona, supra. Miranda, however, is not primarily a right to counsel case but rather is focused on the Fifth Amendment right to remain silent. The right to counsel under Miranda is not the primary right being asserted, rather it is a protective right indispensable to the assertion of the individual's primary Fifth Amendment right to remain silent. That is why, under the scheme of Miranda, a person in custody who is to be subjected to interrogation must first be informed that he has the right to remain silent. Miranda, supra at 467-468. It is only after a person is told of his right to remain silent and that anything he says can and will be used against him that he must be informed of his right to counsel. Even though the assertion of the right of counsel is a significant event such that interrogation must cease until an attorney is present, it is still a subsidiary right supportive or protective of the greater Fifth Amendment right to remain silent.

Even within the Miranda opinion it is recognized that despite the critical aspect of the right to counsel, it is the right to remain silent that is the most important right being protected under the Fifth Amendment. For example, Miranda, supra, decrees that when an individual indicates in any manner at any time that he wishes to remain silent, the interrogation must cease. Miranda, supra at 473-474. Nowhere does Miranda indicate that questioning on the same subject matter can be resumed by the police. [However, Michigan v. Mosley, 423 U.S. 96

(1975), does permit the police to initiate further interrogation of an accused after he has asserted his right to remain silent, but only about crimes other than the one the accused desired to remain silent about.] This is because the right to remain silent is an absolute right to cut off questioning which must be scrupulously honored by the police. However, with respect to an individual's assertion of his right of counsel, Miranda holds that the interrogation must cease only until an attorney is present, thereby providing the police with a means of continuing the interrogation. Miranda, supra at 474.

Accordingly, where additional safeguards are necessary when the accused asserts his subsidiary or protective right to counsel, those same safeguards must be extended to protect the primary right to main silent. Where an individual clearly refuses to waive his Miranda rights thereby asserting his right to remain silent, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been re-advised of his rights. Further, when an individual expresses his desire to remain silent, he is not subject to further interrogation on the original subject matter by the police unless the accused himself initiates further communications.

It is clear that in view of the safeguards provided in Miranda v. Arizona, supra, and Edwards v. Arizona, supra, the confessions made by Mr. Krier while in custody in Georgia were inadmissible at trial. If it is assumed, as it was by the Supreme Court of Georgia, that the defendant asserted his right to counsel, this Court's decision under Edwards prohibited further interrogation of Mr. Krier until he obtained the assistance of counsel. If it is assumed that Mr. Krier's refusal to waive his Miranda rights amounted only to an assertion of his right to remain silent, the ruling of this Court in Miranda mandates that the police could only continue interrogation after communication initiated by Mr. Krier or after

Mr. Krier obtained the assistance of counsel. Thus, the decision of the Supreme Court of Georgia must be reversed.

3. The jury's impermissible consideration of Petitioner's prior conviction for armed robbery.

In Furman v. Georgia, 408 U.S. 238, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153 (1976), reaffirmed this holding: "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id at 189, (Opinion of Stewart, Powell and Stevens, JJ.). This means that if a State wishes to authorize capital punishment, it has a constitutional responsibility to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 100 S.Ct. 1759 (1980), citing Gregg v. Georgia, supra, 428 U.S. at 198, Proffitt v. Florida, 428 U.S. 242, 253 (1974), and Woodson v. North Carolina, 428 U.S. 280, 303 (1974).

In the case now before this Court, Petitioner filed a pre-trial Motion in Limine requesting the Court to prohibit the State from introducing evidence of Petitioner's prior conviction for the offense of armed robbery. This motion was denied. (T. 258-261). Because of the Trial Court's ruling, Petitioner was forced to alter his trial strategy and introduce evidence of his prior armed robbery conviction and escape from prison. (T. 1225-1226, 1341-1354). At the close of the sentencing phase of the trial, the State introduced and the Trial Court admitted certified copies of Petitioner's prior conviction for armed robbery and sentence of 27 to 29 years. (T. 1314-1315). The jury was given

no limiting instructions on how it could apply Petitioner's prior conviction and sentence during its sentencing deliberations.

The sole ground upon which the Trial Court instructed the jury that the death penalty could be imposed was that the "offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." (T. 1489). Georgia Code Annotated §27-2534.1(b)(7). The Court did not instruct the jury that it could not use the Petitioner's prior conviction and escape in determining whether or not this statutory aggravating circumstance existed, thereby creating the danger that the jury did, in fact, use Petitioner's prior conviction and escape in finding the aggravating circumstance, even though it would be a wholly irrelevant consideration. The questions asked by the jurors before they rendered a decision on the sentence indicate that they were considering very strongly the fact that Petitioner had a prior conviction and had escaped from prison. (T. 1504; p. 6 of Report of the Trial Judge, attached hereto as Appendix D).

Because there were no limiting instructions by the Trial Court on the use of Petitioner's prior conviction and escape, it cannot be determined with the degree of certainty required in capital cases, that the evidence of the prior conviction did not make a critical difference in the jury's decision to impose the death penalty. See, Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). Because the jury's discretion was not sufficiently channeled, see, Godfrey v. Georgia, supra, the process in which the death penalty was imposed in this case was not "rationally reviewable," Woodson v. North Carolina, supra, and intended to diminish the reliability of the sentencing determination. See, Beck v. Alabama, 447 U.S. 625, 638 (1980); Gardner v. Florida, 430 U.S. 349 (1977). Because the jury was not suitably limited in the use it could make of Petitioner's prior conviction and escape, the risk of an unwarranted death sentence was enhanced and, therefore, Petitioner's death sentence cannot stand.

CONCLUSION

The affirmance of Petitioner's conviction by the Georgia Supreme Court squarely contravenes the decision in several cases of this Court by denying Mr. Krier's right to have a jury consider all lesser included offenses within the charge of murder, by ignoring Mr. Krier's claim to a lawyer and the assertion of his rights under Miranda and allowing the jury to consider irrelevant factors in its determination of the sentence Mr. Krier was to receive. For these reasons, it is respectfully requested that this Court grant Certiorari.

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